Supreme Court, U.S.
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No. 02-407

In The
Supreme Court of the United States

EVA B. HUNTSINGER,

Petitioner,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there is a split among the circuit courts of appeal regarding a public employee's freedom of speech rights, or have some opinions merely emphasized different factors established by this Court in determining whether the employee's speech should be protected by the First Amendment to the United States Constitution based on the varying facts of each case?

2. Do statements by a public employee made in an attempt to resolve a perceived issue relating solely to that employee's own job constitute speech concerning potential governmental misfeasance?

3. Did the Tenth Circuit properly affirm the dismissal of a claim which lacked all elements necessary to state a claim for relief?

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STATEMENT OF FACTS

Eva Huntsinger ("Huntsinger") was employed as an engineer by the E-470 Public Highway Authority, a body corporate and a subdivision of the State of Colorado (the "Authority"). (Pet. at 61a, ¶ 5, 62a, ¶ 8.) Both she and her late husband, Thomas Huntsinger, previously worked for another engineering company, CH2M Hill ("Hill"). (Pet. at 62a, ¶¶ 10, 11.) When Thomas Huntsinger retired, Hill gave him a promissory note in exchange for stock he owned in the company. (Pet. at 62a-63a, ¶ 11.)

Hill was part of a team of contractors and engineers competing for a highway design and construction project to be undertaken by the Authority. (Pet. at 63a-64a, ¶ 14.) When Huntsinger found out that Hill was among the companies attempting to obtain the work, she called Hill directly and discussed early payment of the note payable to her husband. (Pet. at 63a-65a, ¶¶ 14-19.) Huntsinger called Hill before she gave any notice of the situation to the Authority (Pet. at 64a, ¶ 15), and thereby violated the Authority's written policies that any potential or perceived conflict of interest be reported, in advance, to the Authority's Executive Director. (Pet. at 63a, ¶ 12.)

Huntsinger's communications to Hill were such that Hill found it necessary to involve its general counsel, she gave another Hill employee the impression that Hill faced the possibility of being excluded from the selection process and Huntsinger was required to have further communications with Hill to describe "errors" in Hill's correspondence regarding her telephone calls and in an attempt to "clarify the situation." (Pet. at 65a-66a, ¶¶ 19, 20.)

The Authority subsequently terminated Huntsinger for violating the Authority's personnel policies. (Pet. at

67a, ¶ 25.) Such termination did not occur on October 8, 1998, as alleged in the Petition (Pet. at 4), but occurred only after a pre-termination hearing before her immediate supervisor. (Pet. at 68a, ¶ 27.) Ms. Huntsinger further was provided a post-termination hearing before the Authority's then acting Executive Director. (*Id.*)

REASONS FOR DENYING THE PETITION

I. There is no conflict among the circuit courts of appeal in the manner in which they apply this Court's prior opinions regarding a public employee's rights of free speech as guaranteed by the First Amendment to the United States Constitution.

Petitioner, Eva Huntsinger asserts that a conflict exists among the circuit courts of appeal in the manner in which they have applied this Court's holdings on public employees' First Amendment rights. Huntsinger claims that the appellate courts have divided themselves into three distinct camps in the manner in which they determine if a public employee's speech merits First Amendment protection. She describes those camps as those which consider only the content of the speech at issue, those which consider only the role of the speaker and those which look only at the speaker's point or motivation. (Pet. at 13-20.)

There is, however, no "split" among the circuits. This Court, in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), established the principles by which the lower courts are to decide cases involving a public

employee's First Amendment rights. *Connick* sets forth various factors that may be examined in determining "[w]hether an employee's speech addresses a matter of public concern . . . ." *Connick*, 461 U.S. at 147-148, 103 S.Ct. at 1690. Following *Pickering* and *Connick*, appellate courts have considered public employee speech cases arising from a variety of unique factual circumstances. As they have done so, those courts have emphasized different factors from *Connick*, depending on the facts of each case. For example, in some cases the content of the speech may be of such obvious public concern that other *Connick* factors, such as the form and context of the speech, were not as prominent in the analysis of whether the speech merited First Amendment protection. In other cases where the content was more neutral, the role of the speaker and whether he or she was attempting to bring some governmental abuse to the public's attention may have weighed more heavily in the court's decision. The existence of a different emphasis on one factor or another, depending on the facts before the court, does not create a conflict among various courts which would warrant this Court's review.

Huntsinger's authorities fail to demonstrate a true divergence among the circuits such as the split which was present in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614 (1988). In that case, this Court noted that some circuits approved the remand of certain cases, while others disapproved remanding the same types of cases. A true split also was noted in *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707 (1999), where some circuits required a jury's determination of previous criminal violations to be unanimous, while other circuits did not require the jury's decision on that issue to be unanimous.

The same type of inconsistencies are absent in the cases cited by Huntsinger. For example, Huntsinger argues that *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), *certiorari denied*, No. 01-1548, 2002 WL 706612 (U.S. Oct. 7, 2002), demonstrates that the Sixth Circuit looks only at the content of the speech and not the role of the speaker in evaluating the speech at hand. In *Farmer v. Cleveland Public Power*, 295 F.3d 593 (6th Cir. 2002), however, the same circuit court of appeals, in considering the "content, form and context" of the speech, looked at the employee's "purpose or intent" and whether the speech was a "routine matter within the scope of her duties as a CPP employee . . . ." *Id.* at 600, 601. Thus, the Sixth Circuit reviews and applies factors beyond the content of the speech in determining if speech warrants First Amendment protection.

Huntsinger claims that *Boring v. Buncombe County Board of Education*, 136 F.2d 364 (4th Cir. 1998), *certiorari denied*, 525 U.S. 813, 119 S.Ct. 47 (1998), and *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *certiorari denied*, 496 U.S. 926, 110 S.Ct. 2620 (1990), show that those circuits look only at the role of the speaker in evaluating the speech. Those cases, like *Cockrel*, were cases in which a school teacher sought First Amendment protection for certain speech. While the courts in *Kirkland* and *Boring* held that the speech at issue, Boring's selection of a play and Kirkland's distribution of an unauthorized reading list, did not merit First Amendment protection, their focus went beyond the role of the speaker. One of the overriding concerns in those cases was whether an individual teacher or the school board should be given the right to establish the school's curriculum. The courts in those cases found that the better

approach is to favor the school board's decisions and not extend First Amendment protection to a school teacher's choice about the content of the curriculum to be taught in their classrooms. Both *Kirkland* and *Boring*, however, applied various factors of *Connick* in reaching their conclusions.

In *Kirkland*, for example, the court looked to the content of the speech as well as the role of the speaker. That court recognized: "It is well settled that even nontenured public school teachers do not shed first amendment protection in *speaking on matters of public concern*." *Kirkland*, 890 F.2d at 798 (emphasis added). The court noted further, "[i]f the *nature of the speech* is purely private, such as a dispute over one employee's job performance, a nontenured teacher enjoys no first amendment protection as to that speech." *Id.* at 799 (emphasis added).

Similarly in *Boring*, the court noted: "Since plaintiff's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection." *Boring*, 136 F.3d at 369.

The court in *Cockrel* was critical of *Kirkland* and *Boring*, and said that not all speech by a teacher in a classroom lacks First Amendment protection. The *Cockrel*, court, however, overstated the holdings of *Kirkland* and *Boring*. As discussed above, those cases did not hold that *all* speech by a teacher in a classroom is private, as the *Cockrel* court implied. It should be noted also that this Court denied review of *Cockrel*, *Kirkland* and *Boring*.

Huntsinger's argument that the Eighth Circuit "limits its consideration to the speech itself and whether or not it addresses matters of public concern, rather than extending the analysis beyond the content of the speech" (Pet. at 15) also is belied by the very authority cited in support of this proposition. In *Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000), *certiorari denied,* 532 U.S. 1008, 121 S.Ct. 1734 (2001), the court applied what it termed the "Connick Analysis" which it noted as requiring an examination of the "content, form and context of the speech as revealed by the entire record." *Id.* at 878. The first issue examined was the content and the Eighth Circuit concluded that the content of the employee's speech did concern a matter of public interest. That was not the end of the court's inquiry, however. The court went on to examine the form and context, including arguments raised by the City that the speech was made only in private and that the employee's motives were personal. *Id.* at 879-880. While the court rejected the defendant's arguments, it recognized them as valid considerations under the *Connick* analysis.

Contrary to Huntsinger's assertion that the Eleventh Circuit "requires courts to consider the motive underlying the speech in order to determine whether or not it is protected" (Pet. at 17), Huntsinger's own authorities again demonstrate that the Eleventh Circuit looks beyond the motive or purpose of the speaker. In *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), the court recognized that, under *Connick*, it should examine the "content, form and context of a given statement as revealed by the whole record." *Id.* at 1352. That court stated: "For *several reasons*, we find that under *Morgan*, Maggio's § 1983 claim does not allege any speech on a matter of public concern." *Id.* (first emphasis added). The court's first consideration

was the forum of the speech, which was at an employee grievance hearing. *Id.* at 1352-53. The second consideration was the content of the speech. *Id.* at 1353. It was only after those issues were reviewed that the Eleventh Circuit looked at the speaker's motivation and the purpose behind her speech in concluding that it was not protected by the First Amendment. *Id.* at 1353-54.

The Seventh Circuit also looks beyond the speaker's motivation. While the court in *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), did look at the "point" of the employee's speech, it also considered the content of what was stated and the manner in which it was communicated. The Seventh Circuit quoted with approval the trial court's comments that the fact that the employee testified in his deposition that he was expressing a personal opinion of his supervisor's work "knocks the props out from under the assertion that [employee] Linhart felt his differences with [supervisor] Glatfelter represented a matter of public concern." *Id.* at 1010. Focusing also on content and the forum where the speech was expressed, the Seventh Circuit noted that, had the employee accused his supervisor of inefficiency or incompetence, or had he publicly criticized his supervisor, his speech would have been protected by the First Amendment. *Id.* at 1011. It is thus improper to characterize this case and this circuit as concentrating only on the speaker's motivation.

Notably, in *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the same circuit court of appeals, in finding that the employee's speech was protected by the First Amendment, stated: "Although the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that

speech, *motive alone is not dispositive.*" *Id.* at 1264 (emphasis added).

In this case, the Tenth Circuit also looked at a variety of the *Connick* factors in reaching its conclusions and did not focus solely on motive as Huntsinger argues. Here, the Court of Appeals noted that the trial court's decision that the speech was not protected by the First Amendment was based on two primary reasons. While it noted its first reason was "that taken as a whole, the complaint demonstrates that Ms. Huntsinger's speech was motivated by primarily personal interest" (Pet. at 15a), the analysis did not stop there. It also recognized the trial court's second reason was that "*in substance* . . . the complaint contained no allegations of corruption or ineptitude on the part of the Authority that would warrant protection of the speech in question." (*Id.*) (emphasis added). In another portion of her petition, Huntsinger acknowledges that the Tenth Circuit examined the content of her speech as well. She states: "The Court in *Huntsinger* placed great emphasis on the lack of allegation that the Authority acted improperly with relation to the potential conflict of interest involved." (Pet. at 21.) Thus, as Huntsinger concedes, the Tenth Circuit in this case looked to the content of the speech as well as the role and motivation of the speaker.

Additionally, Huntsinger does not state what steps this Court should take in response to her argument. The factors to be considered and the appropriate test are well set forth in *Pickering* and *Connick*. Were this Court to mandate that all such factors must be present equally in all cases, lower courts would be constrained artificially and would be unable to weigh each factor in light of the facts before it in determining whether the speech addressed a matter of public concern and should be granted

First Amendment protection. The relevant cases cited by both parties in this action recognized and followed the standards as set forth in *Pickering* and *Connick* as the leading authorities in this area and no further embellishment on those standards is necessary.

II. This Court already has addressed the question of the protection of speech concerning potential wrongdoing and the District Court and the Tenth Circuit Court of Appeals properly determined that Huntsinger's complaint failed to allege any potential governmental misconduct.

Huntsinger argues that certiorari should be granted "to determine whether First Amendment protection should extend to speech relating to a prospective breach of the public trust . . . ." (Pet. at 20.) As Huntinger notes, this Court already has recognized that, in the proper case, speech concerning potential misfeasance may warrant First Amendment protection. *Connick,* 461 U.S. at 148, 103 S.Ct. at 1691. However, *Connick* does not state that such speech is, *per se*, related to a matter of public concern. A court still must evaluate such speech based on the "content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690.

The Tenth Circuit did not hold that no speech concerning potential governmental misconduct merits First Amendment protection. It stated that Huntsinger was seeking protection for speech "made as a preemptive strike against possible misconduct." (Pet. at 21a.) The Tenth Circuit rejected Huntsinger's argument "as presented here." (*Id.*) In other words, the Tenth Circuit's ruling was based on the facts as alleged in this case. Accordingly,

certiorari to consider whether speech concerning potential misconduct should be protected by the First Amendment is unnecessary.

Additionally, the court below was correct in concluding that Huntsinger's complaint lacks any allegation of future or potential wrongdoing. The content of each of her communications concerned only her personal situation and that of her husband. The context in which these matters were raised centered completely on Huntsinger's communications with Hill and the Authority to resolve a personal matter. Her role was always that of an employee trying to deal with a personal employment issue and her point, purpose or motivation was to handle the predicament in which she perceived herself. The complaint contains no facts indicating that she made her speech in the role of a private citizen attempting to bring any actual or potential wrongdoing to the public's attention and no allegations from which any court could discern that the subject matter, motivation or role of the speaker was other than to address an employment issue personal to her.

The complaint demonstrates that the predicament which was the subject of Huntsinger's speech was of her own making when she chose to call a prospective bidder and tell them to pay, or otherwise resolve, a promissory note payable to her husband, before raising the matter with her superiors as required by the acknowledged policies of her employer. (Pet. at 64a, ¶ 15; 63a, ¶ 12.) Accordingly, the lower courts' rulings were correct and a writ of certiorari is not warranted.

III. The District Court and Tenth Circuit Court of Appeals properly dismissed Huntsinger's substantive due process claim as it lacked several elements necessary to state a claim for relief.

The letter and the allegations of the complaint which Huntsinger alleges comprise her substantive due process claim clearly fail to contain all of the elements necessary to establish such a claim. Huntsinger concedes that a substantive due process claim in this context requires "allegations of a termination based on a publicized false charge of sufficient severity that would make her an unlikely candidate for future employment." (Pet. at 24.) The letter on which Huntsinger's substantive due process claim is based is set forth in its entirety in the complaint. (Pet. at 68a-69a, ¶ 28.) The letter fails even to identify Huntsinger as the person discussed therein. Moreover, the complaint contains no allegations that the recipients of that letter had any idea, at the time it was sent, that she was the employee being discussed.

The trial and appellate courts' findings that the complaint's allegations failed to establish the falsity of the letter's contents or damages to Huntsinger as the result also were correct and do not warrant further review by this Court.

CONCLUSION

Eva Huntsinger's complaint concedes that, in violation of the established policies of her employer, she contacted a prospective bidder on a large construction project and discussed financial matters involving the payment of significant sums to her husband, before she contacted her

employer about the matter. The decision of the Tenth Circuit Court of Appeals in affirming the dismissal of her complaint was based on established precedent of this Court, was in keeping with decisions of other Circuit Courts of Appeal and was appropriate on the merits. The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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